Supreme Court, U.S.
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No. 99-301

In The

Supreme Court of the United States

HOLYWELL CORPORATION,

Petitioner,

v.

BANK OF NEW YORK and
FRED STANTON SMITH, as Trustee of the
Miami Center Liquidating Trust,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

1. This Court Has Jurisdiction To Review 1

2. This Court's *Holywell* Opinion Requires Vacating The Substantive Consolidation Provision Of The Bank's Plan 3

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Beaston v. Farmer's Bank, 37 U.S. (12 Pet.) 102 (1838) 5

Bramwell v. United States Fidelity & Guaranty Co., 269 U.S. 483 (1926) 5

Brown v. Felsen, 442 U.S. 127 (1979) 1

Commissioner v. Sunnen, 333 U.S. 591 (1948) 1

Conard v. Atlantic Ins. Co. of N.Y., 1 Pet. 386 (1828) 5

General Utilities and Operating Co. v. Helvering, 296 U.S. 200 (1935) 8

Holywell Corporation v. Smith, 503 U.S. 47 (1992) 3, 4, 5, 6, 7

King v. United States, 379 U.S. 329 (1964) 5

Klapprott v. United States, 335 U.S. 601 (1949) 2

Miami Center Limited Partnership v. Bank of New York, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988) 1

Sanford Fork & Tool Co., 160 U.S. 247 (1895) 3

Thelusson v. Smith, 2 Wheat 396 (1817) 5

Tozer v. Chas. A. Krause Milling Co., 189 F.2d 242 (3d Cir. 1951) 2

United States v. Gould, 301 F.2d 353 (5th Cir. 1962) 2

United States v. Key, 397 U.S. 322 (1970) 5

TABLE OF AUTHORITIES – Continued

Page

STATUTES

11 U.S.C. § 1123(a)(5)(B) 6

26 U.S.C. § 336 8

28 U.S.C. § 1254 1

31 U.S.C. § 3713(b) 4

OTHER MATERIALS

Federal Rules of Civil Procedure:

60(b)(6) 1, 4

Supreme Court Rule 10 2

Treasury Regulation 1.1502-(6)(a) 7

REPLY BRIEF FOR PETITIONER

1. *This Court Has Jurisdiction To Review.* – The brief in opposition[1] of the respondents, Bank of New York ("Bank") and Fred Stanton Smith, as trustee of the Miami Center Liquidating Trust, is based on the clearly erroneous legal contention that "[n]o jurisdiction exists . . . as the Petitioner has failed to claim or prove the existence of any constitutional issue, important and unsettled question of federal law, or conflict among the circuits," Bank at 1. Thus, the respondents argue that under the doctrine of res judicata and the Miami Center mootness ruling, *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988), this Court lacks authority to grant equitable relief under Fed.R.Civ.P. 60(b)(6) to accomplish justice and vaeate a judgment procured by fraud. We disagree. See, *Brown v. Felsen*, 442 U.S. 127, 132 (1979) (res judicata does not preclude evidence of fraud to vacate a judgment); also *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948) (a final judgment "puts an end to the cause of action . . . absent fraud or some other factor invalidating the judgment.")

Jurisdiction is granted to this Court under 28 U.S.C. § 1254, *Courts of appeals; certiorari; etc.*, which provides, in relevant part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

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[1] Respondents' Brief In Opposition is cited herein as "Bank at ___."

> (1) By writ of certiorari granted upon the petition of any party to any civil . . . case, before or after rendition of judgment or decree.

Although this Court's review on the merits of certiorari "is not a matter of right, but of judicial discretion," Sup. Ct. R. 10, *Considerations Governing Review on Writ of Certiorari*, the reasons to be considered include, in part:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; . . . or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> . . .
>
> (c) When . . . a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

The failure to vacate the bankruptcy court's approval of the substantive consolidation provision of the Bank's plan was clearly an abuse of discretion of the courts below "to exercise a sound, legal discretion, that is, a discretion 'guided by accepted legal principles',"[2] for the following reasons:

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[2] *United States v. Gould*, 301 F.2d 353, 355 (5th Cir. 1962), citing 7 Moore's *Federal Practice*, p. 223, *et seq.*; also, *Tozer v. Chas. A. Krause Milling Co.*, 189 F.2d 242 (3d Cir. 1951); and *Klapprott v. United States*, 335 U.S. 601 (1949).

(1) The decision of the court of appeals is in conflict with this Court's opinion, *Holywell Corporation v. Smith*, 503 U.S. 47, 112 S.Ct. 1021 (1992), sanctions fraud, and is a departure by the lower courts from the accepted course of judicial proceedings for hearings in conformity with this Court's opinion. See *Sanford Fork & Tool Co.*, 160 U.S. 247 (1895).[3]

(2) Whether the doctrine of finality applicable in bankruptcy proceedings based on the Miami Center mootness ruling, for which there is no specific constitutional or statutory authority, precludes equitable relief and justice from a bankruptcy court's order confirming a plan which was procured by fraud, is an important question which should be settled by this Court.[4]

2. *This Court's Holywell Opinion Requires Vacating The Substantive Consolidation Provision Of The Bank's Plan.*

(a) The Solicitor General's argument in the proceedings before this Court does not help the respondents to

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[3] This Court's *Holywell* opinion is the "law-of-the-case" and the lower courts "cannot vary it, or examine it for any other purpose than execution; or to give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal." 160 U.S. at 255.

[4] No other United States court of appeals has held that a bankruptcy court had the power to confirm a plan of liquidation, which did not provide adequate means for the payment of taxes due on the income attributable to the sale of property under the provisions of a plan based on the application of the doctrine of substantive consolidation to fraudulently convey property *without* consideration or to eliminate the valid claims of insiders with a superior priority to part or all of the liens of the plan's proponent.

argue that equitable relief should not be granted under Fed.R.Civ.P. 60(b)(6) to vacate the substantive consolidation provision of the Bank's plan in order to accomplish justice. The Solicitor General argued:

> The collateral consequence that occurs if the trustee is deemed to be an assignee is somewhat significant. . . . The United States would have an absolute priority for the payment of taxes under the absolute priority statute, instead of a bankruptcy priority under [§] 507 of the [Bankruptcy] Code and under the [Bank's] plan, and the trustee would also be personally liable for taxes under [31 U.S.C. §] 3713(b).[5]
>
> We differ with the debtors on this only in that we think it is clear under cases like *In re San Juan Hotel* from the First Circuit . . . that a trustee has a fiduciary duty under title 11 to pay taxes and can be personally liable if he fails to do so.

S.Ct., *Transcript*, December 4, 1991, at 15. This Court agreed with the Solicitor General and the Petitioner that the trustee was an "assignee of 'all' or 'substantially all' of the property of the corporate debtors," 503 U.S. at 54.[6]

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[5] Section 3713(b) of Title 31, United States Code, Money and Finance, provides in part:

> (b) A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.

[6] The manner in which 31 U.S.C. § 3713 operates has been well described in a case decided over a century and a half ago, when the statute (apart from the exception for the Bankruptcy Code) had the same structure as it now has:

(b) This Court did specifically reject the Solicitor General's argument that "the bankruptcy plan substituted the trustee for Gould but did not alter the bankruptcy estate," 503 U.S. at 55.[7] Thus, the trustee is not "a

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> From the language employed in this section, and the construction given to it, from time to time, by this Court, these rules are clearly established: first, that no lien is created by the statute: secondly, the priority established can never attach while the debtor continues the owner and in the possession of the property, although he may be unable to pay all his debts: thirdly, no evidence can be received of the insolvency of the debtor, until he has been divested of his property in one of the modes stated in the section: and fourthly, whenever he is thus divested of his property, the person who becomes invested with the title, is thereby made a trustee for the United States, and is bound to pay their debt first out of the proceeds of the debtor's property.

Beaston v. Farmer's Bank, 37 U.S. (12 Pet.) 102, 133-34 (1838); also, *Thelusson v. Smith*, 2 Wheat 396, 426 (1817); *Conard v. Atlantic Ins. Co. of N.Y.*, 1 Pet. 386, 439 (1828); *Bramwell v. United States Fidelity & Guaranty Co.*, 269 U.S. 483, 488 (1926); *King v. United States*, 379 U.S. 329, 336-338 (1964); *United States v. Key*, 397 U.S. 322, 324-325 (1970).

[7] This Court's *Holywell* opinion held:

> Whether or not the Bankruptcy Code permits a plan to place a new fiduciary in charge of an estate after confirmation, as the United States contends, we do not believe that a mere substitution occurred in this case. The plan, as quoted above, "declared and established" the new Miami Center Liquidating Trust. It then vested all of the assets of Gould's estate to respondent Smith as trustee. The plan did not simply substitute the trustee for Gould as the fiduciary of the estate. Rather, it created a separate and distinct trust holding the property of the estate and gave the

trustee acting under title 11" and the respondents are collaterally estopped from arguing that Smith was a "bankruptcy trustee," Bank at 1, n. 1.[8]

(c) The Solicitor General and the Petitioner also argued in the proceedings before this Court that assets that generate income should generally be chargeable with the taxes attributable to their income and "Congress has ensured that the duty to report and pay taxes will follow the assets from which the income is realized and from which the tax payment is made," *Petition Of United States For A Writ Of Certiorari*, March 1991 at 10. This Court agreed, 503 U.S. at 52 ("the trustee must pay the tax on the income attributable to the corporate debtors' property").

Since Holywell Corporation and its subsidiaries[9] were severally liable for the payment of taxes as the

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trustee control of this property. The Bankruptcy Code expressly permits this arrangement. See 11 U.S.C. § 1123(a)(5)(B) (authorizing a plan to transfer "all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan"). The trustee, therefore, is not acting as the fiduciary of Gould's bankruptcy estate.

[8] In the prior proceedings before this Court, the respondents argued that "[t]o begin with, the Liquidating Trustee is not a 'trustee in a case under title 11 of the United States Code' because that phrase – which is a term of art in the bankruptcy context – refers only to the statutory trustees that may be appointed in cases under Chapter 7, 11, 12, and 13 of the Bankruptcy Code." *Brief In Opposition Of Respondent The Bank of New York*, April 1991 at 17. This Court agreed.

[9] The factual representation of the respondents to this Court is *false* that "Holywell . . . as a result of the confirmation of

members of an affiliated group, Treas. Regulation 1.1502-(6)(a), the creation of the Miami Center Liquidating Trust and the substantive consolidation provision of the Bank's plan was an unlawful scheme to evade taxes and to defraud creditors with valid claims as insiders. Thus, the trustee misappropriated Holywell's cash to pay the claims of creditors against the Miami Center Limited Partnership's estate for which Holywell was not liable and fraudulently conveyed property without consideration.

Alternatively, the tax consequences of the liquidation of the debtor corporations under the plan's substantive consolidation provision prior to the trustee's sale of the Miami Center[10] means that the Internal Revenue Service erroneously asserted against Holywell Corporation & Subsidiaries corporate income taxes attributable to capital gains for the fiscal year ended July 31, 1986. See Bkrtcy. S.D. Fla., *Rule 60(b) Motion To Vacate Order Approving Substantive Consolidation*, November 24, 1993, at 4-5; also,

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the Bank's Plan . . . was thereby given a 'fresh start' and relieved of over $300 million in debts," Bank at 7.

The principal amount of the total claims of creditors allowed against Holywell's estate was $3,369,259.84, and as of October 10, 1985, Holywell and its nondebtor subsidiaries had cash and U.S. Treasury Bills (par value) of $27,808,476.52.

[10] This Court's *Holywell* opinion held "[n]o tax liability becomes due under § 6151 until the time required for making those returns," 503 U.S. at 58. Under the substantive consolidation provision of the Bank's plan, Holywell and its subsidiaries were liquidated upon the transfer of their property as a liquidating dividend to the trustee of the Miami Center Liquidating Trust "for the express purpose of liquidating Gould's estate," 503 U.S. at 56.

26 U.S.C. § 336 (prior to August 1, 1986); *General Utilities and Operating Co. v. Helvering*, 296 U.S. 200, 204 (1935).

CONCLUSION

For the foregoing reasons, and for the reasons stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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